



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-89-30

FACTS:

You are the appointed Police Chief in a Town. Your regular work hours are Monday-Friday, 8 a.m. - 4 p.m. You have the weekends off. When you are out of town, a designated police officer assumes your duties.

You have been asked by a new private resort XYZ in Town to oversee their private unarmed security force. No alcohol is served on the grounds. XYZ employs more than 300 people and has its own security staff. XYZ has its own internal security policies which are similar to those used at another XYZ location out of state.

According to your consulting employment agreement with XYZ, you would work 15 hours per week. Your responsibilities would include evaluating the performance of the security force's work as well as conducting "nightly checks with the shift supervisor, checking the incident log, and (being) available for questions relative to security inquiries." XYZ has provided additional information on your proposed employment arrangement. XYZ view you as a consultant-independent contractor rather than an employee. You would be responsible for paying your own taxes on income from XYZ and your salary would be fixed. You would not be eligible for any bonus, overtime compensation, or benefits from XYZ. While there is no written job description for your consulting position, XYZ states that your responsibilities would include ongoing performance reviews of the private security force members and their adherence to XYZ's policies and procedures. XYZ states that you would report directly to the Director of Security (Director) who is on the premises of XYZ in excess of sixty hours per week and is on call around the clock. Although the Director has no background in security matters, he has access on a daily basis to an experienced security director at XYZ's other location.

According to the Director, your direct contact with security force members would be minimal. You would help to interview and evaluate applicants for security force positions as well as discuss security issues and procedures with staff members and answer their questions. Additionally, your consulting position would include reviews of XYZ's security logbook and internal incident reports. If necessary, for example, you would review and discuss an incomplete incident report with a staff member. According to the Director, if an incident or crime occurs, an internal incident report is completed. Depending on the nature of the incident, the resort may also notify the police. If a crime is in progress, XYZ would call the officer on duty at the Police Department whether or not you are on the premises of the resort. It is understood that you would never be the officer on duty at the Police Department. There is no direct line between XYZ and the Police Department.

The Director understands that as Police Chief, you would not be involved in any police matters relating to XYZ or its employees. For example, as Police Chief, you would delegate any non-emergency matter involving XYZ to another police officer. Furthermore, the Town Board of Selectmen voted to agree to allow you to engage in outside employment at XYZ for a maximum of 15 hours per week with the provision that you would remain available to respond to any Town Police Department emergency matter. The Selectmen's vote also states that your outside employment is subject to a six and twelve month review.

You state that your private work would be performed outside of your regular Police Chief hours. XYZ is willing to provide in writing that any Police Department matters which arise while you are at XYZ would take precedence over your private employment. You do not foresee any circumstances where the resort will need to hire Town policemen for detail work.

QUESTION:

May you accept the paid private employment with XYZ to provide ongoing consulting services involving the supervision of the resort's private unarmed security force?

ANSWER:

Yes, provided that you comply with § §3, 17, 19 and 23, as described below.

DISCUSSION:

Section 19

Section 19 prohibits you from participating^{1/} officially in a particular matter^{2/} in which you, your immediate family^{3/} or partner, a business organization in which you serve as officer, director, Trustee, partner or employee or any person or organization with whom you are negotiating prospective employment has a financial interest.

Under this section, you may not participate as the Police Chief on any particular matter, including any recommendation or decision, where it is reasonably foreseeable that the financial interest of XYZ would be affected. See, EC-COI-86-13; 87-31. You will remain subject to the provisions of §19, so long as you are an "employee" of XYZ. Although the language of §19 does not expressly include "independent contractors," the Commission is not bound to a formal name for a position to determine whether the requirements of §19 apply. See, EC-COI-87-10 (abstention provisions of §19 applied to a bank corporator whose position was analogous to a corporate director). In EC-COI-83-34, the Commission concluded that a state employee who also worked part-time as a bank conveyancer was not a bank employee for the purposes of §6 (a parallel provision to §19 applying to state employees). The Commission stated that its decision

was based on the “comparatively small portion of (his) income attributable to services which (he) perform(s) for the Bank and the relative infrequency of those services(s).” Id. at p.2. The Commission also noted that the individual’s increased Bank work could place him within the scope of § 6. In applying these factors to your consulting arrangement with XYZ, we conclude that for the purposes of § 19 you would be considered an “employee” of XYZ. We base this conclusion on several factors, including the significant number of regular hours per week that you would be “consulting” to XYZ, the fact that you report directly to a director, and the important nature of your consulting services. Furthermore, your employment agreement lacks a specified period of time or a particular objective for your consulting services. These factors indicate that you would be considered an XYZ employee under §19.

Therefore, absent the exemption described below, under §19 you may not participate in any Police Department determinations on matters such as the enforcement of health code violations or police investigations involving XYZ, its employees or guests, where such determinations would foreseeably have a financial impact on that business entity. Again, this prohibition will continue so long as you are employed by XYZ. See, In the Matter of Charles Lawrence, 1987 SEC 284 (Disposition Agreement). This section would also preclude you from arranging or supervising Town Police detail at XYZ. See, In the Matter of John A. DeLeire, 1985 SEC 236, 237.

You may seek an exemption from the provisions of §19 if you advise your appointing authority, in writing, of the nature and circumstances of your employment at XYZ, and you disclose any matters which may foreseeably affect XYZ’s financial interest and are likely to fall within your official responsibility. In addition, you must receive, in advance, a written determination made by your appointing official that XYZ’s financial interest in any such matters is not so substantial as to be deemed likely to affect the integrity of the services which the Town may expect from you. See, Commission Advisory No. 10 at p. 3.

In order to ensure your total compliance with §19, it would be necessary for you to make additional §19 disclosures whenever a new matter you did not previously disclose arises under your official responsibility and that matter could foreseeably affect XYZ’s financial interest. Exemptions under §19(b)(1) must be granted in advance of the activity proscribed by §19.^{4/}

Section 17

Section 17(a) and (c) prohibit you, otherwise than as provided by law for the proper discharge of your official duties, from directly or indirectly receiving compensation from, or acting as agent for, anyone other than the Town in relation to any particular matter in which the Town is a party or has a direct and substantial interest. The purpose of §17 reflects the maxim that an “individual cannot serve two masters” and thus serves to ensure that your private interests are separate from your public duties to the Town. See, *Edgartown v. State Ethics Commission*, 391 Mass. 82 (1984).^{5/}

For example, under §17(c) you cannot act as a representative on behalf of XYZ on any permit, application, or other matter submitted to the Town. You may not personally appear nor make phone calls or written communications on behalf of XYZ to any municipal agency of the Town on such matters, including, but not limited to, Town permits, licenses, applications, inspections or investigations. See, EC-COI-87-27 (a personal appearance includes telephone calls made by a public employee on behalf of another). You must avoid acting as XYZ's "agent" on matters of direct and substantial interest to the Town. See, In the Matter of Paul Sullivan, 1987 SEC 312, 314-315; EC-COI-87-31; 88-9.

Even if you avoid any role as agent or spokesperson for your private employer, under §17(a) you may not be paid by XYZ in connection with particular matters of direct and substantial interest to the Town. For instance, §17 would prohibit you as a paid consultant to XYZ from performing or overseeing an internal investigation of a crime at XYZ which is also the subject of an investigation by the Town. Similarly, you may not be paid to advise XYZ on how best to proceed at Town hearings and meetings. See Commission Advisory No. 13; EC-COI-85-59; 84-116. See also, EC-COI-87-31; 88-9.

Thus, under the provision of §17(a) and (c) we conclude that you may work for XYZ only if your consultant duties are restricted to matters which are not in relation to any particular matter in which the Town has a direct and substantial interest. In particular, you must refrain from participating in criminal matters which occur at XYZ as they would inevitably involve the Police Department. For example, if XYZ would be required by the Police Department to submit a summary or a report on an incident or a crime, not only would you be required to abstain from participation as Police Chief (pursuant to §19), you would also be prohibited under this section from begin privately compensated in connection with that submission. You could not be paid by XYZ to check the completeness or veracity of such reports nor to prepare a written summary which is required by the Police Department. If you cannot practically arrange your job to accommodate these restrictions, you cannot accept the private work.

Section 23

Section 23(b) (1) prohibits you from accepting other employment of substantial value, the responsibilities of which are inherently incompatible with the responsibilities of your public office.^{6/} In 1985, the Commission found this section was violated by a municipal police lieutenant who simultaneously held a private job which overlapped with his official duties. See, In the Matter of Adam DiPasquale, 1985 SEC 239. In that case, the police officer was responsible for police personnel on certain shifts. His private employment, as "assistant security chief" for a racetrack, involved his supervision of an internal security force and its operations at the track as well as dealing with violations of internal safety and conduct rules. The track also maintained a "direct security line" to the police department and utilized police detail for patrolling the track and to control traffic at special events. The Commission found the racetrack had "substantial need" for the track's substantial needs for police department services and the nature of the

lieutenant's official duties, the Commission concluded his private employment at the track "necessarily impair(ed) the independence of his judgement in the performance of his official duties" - thereby, violating §23 (¶2) (1) [a prior version of §23(b)(1)].

A similar case, involving c. 268A violations by a police department chief, was considered In the Matter of John A. DeLeire, 1985 SEC 236. The police chief violated § 23 (¶2) (1) by accepting a private consulting arrangement with a racetrack in his municipality which had "substantial needs for his department's services, especially where that private consulting arrangement involve(d) the same area of expertise for which he (was) responsible in his public position as chief..." Id. at 237

The facts you have presented to the Commission involving private, paid security consulting work which you propose to undertake in the municipality where you also serve as the Police Chief, raise fundamental questions as to the compatibility of your public and private positions under §23(b)(1). These concerns are not dissimilar to those discussed in the DeLeire and DiPasquale agreements where violations of §23(b)(1) were found because the private security work "necessarily impaired" the official judgment of the Police Chief and lieutenant. On balance, the Commission finds that §23(b)(1) does not currently prohibit your private employment with XYZ. This finding is based in part on the Board of Selectmen's approval of your employment arrangement with XYZ. The line dividing your situation from DeLeire and DiPasquale is, however, tenuous. Should any material changes in the conditions of your XYZ employment occur, or should XYZ's security needs change, we would need to re-examine our conclusion under §2(b)(1) in light of those changed facts.^{7/}

Even though §23(b)(1) does not prohibit your private employment, other provisions under the standards of conduct, §23, are relevant to your circumstances. Section 23(b)(2) prohibits you from using your official position to secure for yourself or anyone else, an unwarranted privilege or exemption of substantial value which is not available to similarly situated individuals. Issues would arise under this section were, for example, you to use your official position to endorse the resort's security system. See, EC-COI-84-127. This section also prohibits you from using town personnel, telephones, equipment or time to prepare or conduct your private work for XYZ. See, EC-COI-81-87. Section 23(b)(2) also prohibits you from using your official position to gain access to town officials and information which is unavailable to the general public for the benefit of XYZ. See, EC-COI-85-23. See also, 87-7. This section would prohibit you from, for example, screening XYZ employee applicants through computerized records search or background check available to the Police Department.

Section 23(b)(3) prohibits you from acting in a manner which would lead a reasonable person to believe that you are unduly or improperly influenced in the performance of your official duties because of the kinship, rank, position or undue influence of any party or person. Issues under this provision may arise because it could appear that any official dealings you would have with XYZ (even if permitted under §19, as discussed above, because XYZ had no identifiable financial interest in any such dealings) would be influenced by your employment arrangement with that entity. An

exemption from this section is available, however, if you disclose in writing to your appointing authority (the Board of Selectmen) the nature of your employment arrangement with XYZ and the official action you are being called upon to take. You may also wish to file the written statement from XYZ stating that your police duties take precedence over your private work.

Section 23(c)(1) and (2) prohibit you from accepting employment or engaging in a business or professional activity which will require you to disclose confidential information of which you have learned as Police Chief. For the purposes of this section, confidential information is that which is exempt from the definition of a public record under G.L. c. 4, §7. For example, this section prohibits you from divulging any internal Police Department policies or procedures which are confidential in nature.

Additionally, §23(e) provides that heads of agencies may establish and enforce additional standards of conduct. See, EC-COI-85-12. Under this provision, you should check with Town Counsel to determine whether any Town regulation or by-law applies to your situation.

CONCLUSION:

In sum, you may accept the consulting position with XYZ only if you are able to meet the substantial restrictions of § 17, 19, 3 and 23 as outlined above. As indicated above, the Commission considers this a close question, and should your relationship with XYZ change in any material way, or if there is a change in XYZ's security needs, this conclusion will need to be re-examined in light of those changes.

DATE AUTHORIZED: December 21, 1989

^{1/} "Participate" participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

^{2/} "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, power, duties, finances and property.

^{3/} "Immediate family," the employee and his spouse, and their parents, children, brothers and sister.

^{4/} Although you have indicated that the Town Board of Selectmen have allowed your private employment with XYZ, the Selectman's vote of August 11, 1989, is not sufficient to exempt you from the provisions of §19 should you be called upon to act as Chief in any matter affecting the interests of XYZ. Should you desire to participate in any such matter, the Selectmen must provide to you in writing a statement that XYZ's financial

interest is not so substantial as to affect the integrity of your services as Police Chief. See, EC-COI-86-13; 87-31.

^{5/} A corresponding provision contained in §17(b) prohibits a private party compensating a municipal employee in connection with a matter of direct and substantial interest to the town. Your private employer, XYZ would be subject to this provision. See, Public Enforcement Letters 87-5 and 4.

^{6/} The Commission has previously determined that an item of substantial value is anything worth \$50 or more. See, Commission Advisory No. 8.

^{7/} Another issue which arises under §23 is whether your official position requires you to be on duty as Police Chief around the clock. In Commission Advisory No. 10, "Police Chiefs Doing Privately Paid Detail Work," the Commission states, "The position of police chief is generally considered a twenty-four -hour-a-day job, carrying with it, the ultimate responsibility for the operation and activities of the police department." Id at p. 2; see also, EC-COI-85-83; 85-65. We conclude that the advice contained in Advisory No. 10 only pertains to private detail work, paid by either a private party or a town, and which is performed by a police chief. Your circumstances are distinguishable. Your normal work hours are Monday through Friday 8:00 A.M. to 4:00 P.M. and your Department provides other coverage during your off duty hours. In addition, your private consulting position with XYZ is not be considered private detail work. Thus, Advisory No. 10 does not apply to your circumstances.